



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

OCT 31 2006

Reply to:
Attn Of: OWW-135

Lynn Kent, Director
Division of Water
Alaska Department of Environmental Conservation
555 Cordova Street
Anchorage, AK

Dear Ms. Kent:

This letter transmits the U.S. Environmental Protection Agency's (EPA) comments on Alaska's three-volume National Pollutant Discharge Elimination System (NPDES) Program Authorization application that was submitted to us on July 5, 2006. As per our commitment in our letter of August 1, 2006, EPA has reviewed Alaska's entire application and our comments are enclosed with this letter.

As you requested, our review has been thorough and comprehensive. We have done our best to identify all relevant issues that Alaska should consider as it revises its application so that it can put forward a strong and clear NPDES program that will enable the State to protect its waters consistent with the goals and objectives of the Clean Water Act. Consequently, our comments are lengthy and cover both editorial issues, clarification issues, and substantive issues. Our comments are organized consistent with the sections of the application. However, editorial comments are presented together at the beginning of each section. While we have been as thorough as possible in reviewing this complex application, we cannot guarantee that no additional issues will come to light in the future concerning this application, or in the course of our review of any revised submissions.

We expect to engage in discussions with Alaska to work through the comments and resolve the substantive issues. It will be important to ensure that our comments are fully understood and our expectations for how the application could be revised are clear. Consequently, we have scheduled a time to meet with you and your staff the week of November 13th to review the comments, clarify any questions, and discuss potential solutions to the substantive issues.

In the meantime, I would like to highlight some key substantive areas that our review has identified as needing further clarification and revision. Key among the clarifications is that the **Memorandum of Agreement (MOA)** must be a mutually negotiated document. Both parties must agree to its terms and it needs to set forth in detail the procedures our two agencies will follow in implementing our respective roles and provide sufficient details about how we will coordinate our activities. In addition to specific comments, we are also providing a redline/strikeout of the MOA that clearly

shows how we would like it to be revised. A few of the major issues in the MOA that need clarification and revision are:

- **Greater clarity and consistency in the transfer of permits from EPA to ADEC.** MOA revisions are needed to clarify that, upon program approval an existing NPDES permit becomes an APDES permit in accordance with the transfer schedule in Appendix C. A mechanism must be added to the MOA to notify individual permittees and EPA of each permit transfer (i.e., a notification letter and a new cover page for the permit).
- **Several revisions are needed in the section on EPA review and objections to state permits.** We made changes to the MOA to address the following areas:
 - **Adequate Time Period for EPA Review of Draft Permits.**
 - **EPA objection to permits.**
 - **EPA's waiver of permit review.**
- **Reliance on the Performance Partnership Agreement (PPA)** to negotiate program procedures is not appropriate. Specific agreements covering annual performance will be a component of the PPA/PPG. However, the MOA must describe the framework to ensure coordination and cooperation between the agencies, and may not defer negotiation of that framework to the PPA process.
- **Add a section on how ADEC will coordinate/consult with Tribes –** ADEC currently has a Tribal consultation policy that became effective on February 22, 2002, that it could reaffirm in the MOA as the way it will carry out consultation/coordination with Tribes during permitting. It should be noted that EPA will continue to have a responsibility to consult with Tribes even after ADEC is authorized for the NPDES program. If Tribes perceive that the State is not dealing with their concerns appropriately, they will likely come to EPA with their concerns requesting consultation and ask EPA to use its oversight authority. ADEC can minimize how often this happens by reaffirming commitments that have been made in the Millennium Agreement. Reaffirming this commitment will help EPA expedite its consultation with Alaska Tribes regarding authorization of Alaska's NPDES program.

Another substantive area of concern is the absence of **statutory authority** to regulate all of the discharges of pollutants that are subject to the NPDES program. We mentioned two of those areas in our August 1, 2006, letter: State statute exempts from regulation any domestic sewage discharge to a "sewerage system," which includes collection and discharge pipes with no treatment; and Alaska statute exempts munitions discharges from regulation. Other areas that appear to lack statutory authority based on the information we have received from the State to date are:

- **“Indirect” Discharges** – State statute exempts incidental discharges, and certain industrial activities, if they do not discharge “directly into any surface waters of the state.” This appears to exempt certain discharges that must be regulated, such as discharges through privately owned treatment works, or through publicly owned collection systems with no treatment.
- **Monitoring Requirements in Permits** – The CWA and NPDES regulations require authorized states to have discretionary authority to include monitoring requirements in permits for various purposes, including for the development of future permit limits. A State statute eliminates that discretion by allowing ADEC to include in permits only monitoring requirements necessary to determine compliance or “mandated by law.” The Program Description discusses “side agreements” with permittees, which would include additional monitoring requirements outside of the permit, but the Attorney General’s Statement (AGS) does not discuss these agreements, nor does it explain whether or how they are enforceable.
- **Inspection Authority** – State statute provides ADEC with inspection authority *only* when the property owner consents. The AGS cites the State’s warrant authority, but it is not clear that the State statute would allow ADEC to obtain warrants for NPDES inspections at un-permitted facilities, absent consent. Also, even for permitted facilities, it is not clear that ADEC could override this statutory privacy protection by issuing a regulation requiring permit applicants to waive it.

In addition to these statutory concerns, EPA has numerous substantive comments concerning the adequacy of Alaska’s regulations and the Attorney General’s Statement.

Finally, EPA has a significant number of comments on the **Program Description**. Some of the comments concern issues raised in the comments on other sections of the application including:

- **Monitoring Outside of Permits** – As noted above, the AGS explains that ADEC may require the owner or operator of a point source to perform monitoring and reporting outside of APDES permits. As long as the requirement takes the form of an order, approval, or acceptance, it is fully enforceable under state law. However, the program description does not explain how ADEC will implement, conduct compliance monitoring, and enforce these “orders, approvals, or acceptances” outside of APDES permits.
- **Pretreatment** – In the APDES regulations, ADEC adopts and incorporates the pretreatment regulations by reference. However, in the program description, the pretreatment procedures are not consistent with the EPA regulations and in fact are less stringent than federal regulations.

- **Compliance Schedules** – The program description identifies two state regulations that authorize ADEC to issue compliance schedules in permits. One of those regulations appears to provide ADEC the authority to issue compliance schedules in permits in more instances than allowed by the EPA regulations (40 CFR 122.47). For example, the program description explains that ADEC will issue compliance schedules as a response to noncompliance with a domestic wastewater permit for rural villages in Alaska. This is an inappropriate application of compliance schedules as described in 40 CFR 122.47.
- **Inadequate Description of Procedures** – Because of Alaska's limited experience relative to other recently authorized states such as Arizona and Maine, EPA has not had much exposure to ADEC's proposed APDES program. Consequently, the program description needs to provide an adequate description of permitting or compliance and enforcement procedures so that it is clear how ADEC will implement the program. Two areas where detail is lacking are:
 - Lack of procedures or guidance documents for the following: procedures for calculating "reasonable potential" to cause or contribute to exceedence of standards; procedures for calculating effluent limitations; procedures related to the use of effluent and ambient receiving water data; procedures to calculate ambient dependent standards, such as hardness, pH, and temperature; procedures for implementing the anti-degradation policy; and procedures to calculate natural conditions. (We understand there is a guidance document on Natural Conditions but it was not submitted as part of this application.)
 - The State must specify which "variances" a discharger can request when submitting an NOI for a general permit. Federal regulations do not allow permit variances for general permits. A discharger who does not submit an NOI in accordance with the terms of the general permit is not authorized to discharge and may be required to apply for an individual permit.

We look forward to working with you and your staff to resolve these issues and all the comments we are providing with this letter. We are interested in helping ADEC revise its application in response to our comments. In addition, we believe the development and implementation of the capacity plan will ensure that Alaska's NPDES Program will be robust, defensible and protective of Alaska's waters. If you have any questions, you can call me at (206) 553-7151 or you can contact Christine Psyk, my deputy, who has been working closely with EPA's reviewers at (206) 553-1906.

Sincerely,



Michael F. Gearheard, Director
Office of Water and Watersheds

Enclosures:

EPA Comments

EPA Marked-up MOA (redline/strikeout)

cc: Dan Easton, ADEC

Cameron Leonard, ADEC